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Supreme Court of the United States

OCTOBER TERM, 1957

No. 808

GUNNLEIK BERGE,

Petitioner,

against

NATIONAL BULK CARRIERS, INC. and TODD SHIPYARDS CORP.,

Respondents.

BRIEF OF RESPONDENT, TODD SHIPYARDS CORP., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

OCTOBER TERM, 1957

No. 892

GUNNLEIK BERGE,

Petitioner,

against

NATIONAL BULK CARRIERS, INC. and TODD SHIPYARDS CORP.,

Respondents.

BRIEF OF RESPONDENT, TODD SHIPYARDS CORP., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Question Presented

1. Whether the obligation of seaworthiness, traditionally owed by an owner of a ship to a seaman, extends to a workman injured aboard ship while engaged in doing work which is of a type neither traditionally nor customarily done by seamen or by members of the vessel's crew.

Statement

The plaintiff, a rigger employed by the defendant, Todd Shipyards, was injured on October 31, 1952, aboard the *S.S. Bulklube,* when a shackle, to which the chain of a hand hoist was attached, broke, causing the chain to strike him and throw him to the deck. He brought this action against the shipowner and against his employer to recover

damages for his injuries. The shipowner served a cross-complaint on the employer, alleging a right to indemnity in the event of a recovery by the plaintiff.

The action against his employer was discontinued because his exclusive right against his employer was under the Longshoremen's and Harbor Workers' Act. The remaining issues were tried before Judge Murphy and a jury. At the close of the case it was agreed that the issue of damage only be submitted to the jury and that all other issues of fact and law be reserved to the court for determination.

The jury assessed the damages at $100,000.00. The court denied the motion to set aside the verdict without prejudice to its being raised again, if necessary.

On the reserved issues the court found as a fact that the defendant, National Bulk Carriers, the owner of the vessel, was not in control of the vessel when the accident happened; that the shackle pin which broke was defective; and that the defective shackle pin was the proximate cause of the accident. The court concluded as a matter of law that the plaintiff, because of the nature of the work in which he was engaged, was not entitled to the benefit of the shipowner's warranty of seaworthiness, and dismissed the complaint.

The plaintiff appealed to the Court of Appeals for the Second Circuit, which unanimously affirmed the decision of the court below. The opinions of the Court of Appeals and of the Trial Court are printed in the appendix to petitioner's brief.

The material facts in the case have been summarized in the opinion of Judge Murphy, and are not in dispute. The defendant National Bulk Carriers, the owner of the tanker *S.S. Bulklube*, contracted with Todd Shipyards Corp. to do extensive repairs on the vessel, including cutting through the decks and installing new bulkheads, a virtual rebuild-

ing of the interior of the ship. The extent of the repairs is reflected in the contract price of $981,133.00.

The vessel was given to Todd on June 22, 1952, and was not returned to its owner until December 19, 1952. During all that time it was a dead ship, without a crew. The only contact its owners had with it during that time was through a right to inspect to determine whether the structural changes being made conformed to the contract specifications.

The vessel was moved from dry dock to the water as the exigencies of the work demanded. On the day of the accident, it was in the water at the shipyard, adjacent to the machine shops, where Todd's employees were installing tank bulkheads. A crane on the pier lifted the steel bulkhead from the pier and lowered it into the tank. In order to set it into its permanent position in the tank it was necessary to raise it three or four inches from the floor. To do this Todd's employees used a hand hoist, the chain of which was attached to the underside of the deck above by means of a shackle run through a padeye welded by Todd's employees to the underside of the deck. While the plaintiff was pulling on the chain to lift the bulkhead, the pin of the shackle broke, causing the chain to fall and injure him.

The legal problem which the Trial Court and the Court of Appeals were called upon to resolve was whether the owner's absolute duty to provide a seaworthy vessel, together with seaworthy appliances and equipment, extended to this worker who was engaged in making major structural repairs on a vessel not in navigation, work neither historically nor traditionally done by seamen. The conclusion of the Trial Court and of the Court of Appeals was that there is no basis in law or in logic for extending the scope of that duty to such work, and it is respectfully submitted that the conclusion was correct. It conforms to the law as enunciated in decisions of this Court and ex-

presses the almost unanimous view of the problem taken by the judges in the several Circuits. There are no special or important reasons for granting a writ of certiorari, or which call for the exercise of this Court's power of supervision.

Argument

1. THE WARRANTY OF SEAWORTHINESS, AS DEFINED AND LIMITED BY EXISTING LAW, IS AVAILABLE TO SEAMEN AND TO OTHERS WHO, THOUGH NOT EMPLOYED BY THE SHIPOWNER, DO WORK IN THE SERVICE OF THE SHIP OF A KIND THAT WAS FORMERLY AND TRADITIONALLY DONE BY SEAMEN. NO SOUND REASONS EXIST FOR EXTENDING IT, AS THE PLAINTIFF HERE CONTENDS IT SHOULD BE EXTENDED, TO ALL BUSINESS INVITEES ON SHIPS, OR TO WORKMEN WHO PERFORM TASKS ON SHIPS WHICH SEAMEN NEVER DID PERFORM AND WERE NOT EQUIPPED TO PERFORM.

The existence of an absolute and non-delegable obligation on the part of a shipowner to provide for his crew a seaworthy ship, with seaworthy appliances, in addition to his absolute obligation to provide maintenance and cure for sick or injured members of his crew, was first recognized by this court in its decision in *The Osceola*, 189 U. S. 158, 175. Originally embracing only seamen and mariners employed directly by the shipowner, the special protections afforded to seamen because of the hazardous nature of their employment were gradually extended by the Admiralty Courts to other workers who, though not under contract of employment to the shipowner, occupied the status of seamen because they did the type of work which normally and traditionally was done by seamen.

The reasons prompting the extension are given in the opinion of Mr. Justice Holmes in his opinion in *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 52:

> "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen'. But

words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by ship's crew. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 62, 58 L. Ed. 1208, 1212, 51 L. R. A. (N. S.) 1157, 34 Sup. Ct. Rep. 733. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the costs of the business. If they should be protected in the one case, they should be in the other."

The protection given to seamen by the Jones Act was extended to stevedores by the decision in *International Stevedoring Co.* v. *Haverty, supra;* the protection of the warranty of seaworthiness, enjoyed by seamen under the general Admiralty Law, was extended to stevedores by this court's decision in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85. And later cases have held that the warranty of seaworthiness inures to the benefit, not only of stevedores, but of all workmen who occupy the status of seamen and incur the seamen's risks and do the seamen's work. (*Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406; *Torres* v. *The Kastor*, 227 F. 2d 664.)

The reasons for the extension were alike in both instances. Admiralty will not deny its protection to workers merely because they are not classified as seamen, if their status is in effect the status of seamen and they do the work which seamen formerly did. It is the nature of the work, not the title of the employee, which determines whether an employee is entitled to the protection of the warranty of seaworthiness.

The opinion in *Seas Shipping Co.* v. *Sieracki, supra,* clearly enunciates the reasons which prompted the court to extend the scope of the warranty of seaworthiness:

"On principle we agree with the Court of Appeals that this policy is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employees whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. The risks themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done. * * * Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew. * * * That the owner seeks to have it done with the advantages of more modern devisions of labor does not minimize the worker's hazard and should not nullify his protection."

The same reasons were further emphasized in the opinion in *Pope & Talbot, Inc.* v. *Hawn, supra*:

"Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law."

The logic which supports the extension of the protection of the warranty of seaworthiness to those who do the work of seamen in the service of the ship compels the rejection of any attempt to extend it further to workmen whose work is of a kind never done by seamen. The courts have long recognized this and have uniformly confined the protections, originally afforded only to seamen, to those workers who, though not called seamen, occupy the status, and do the work, of seamen. In *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, the opinion states the position taken by the courts in cases where efforts were made to enforce such an extension:

> "The many cases turning upon the question whether an individual was a 'seaman' demonstrate that the matter depends largely on the facts of the particular case and the activity in which he was engaged at the time of injury. The work in which the decedent was engaged at the time of his death quite clearly was not that usually done by a 'seaman'. The boats were not afloat and had neither captain nor crew. They were undergoing seasonal repairs, the work being of a kind that, in the case of larger vessels, would customarily be done by exclusively shore based personnel. • • • It is our conclusion that while engaged in such seasonal repair work Desper was not a 'seaman' within the purview of the Jones Act."

Attempts to have the doctrine of seaworthiness similarly extended were also rejected. (*Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385; *West* v. *United States*, 143 F. Supp. 473; *Raidy* v. *United States of America*, 153 F. Supp. 777.) In each of these cases the court refused to extend the doctrine of seaworthiness to a worker on a vessel which was laid up for major structural repairs, and where the work he was doing was not work usually done by seamen but work that was the normal function of shipwrights and shipyard workers. Traditionally, seamen were employed aboard

the ship, during the voyage, to aid in the navigation and preservation of the ship, and to promote the purposes of the voyage. Everything necessary and incidental to those functions was performed by the seamen, including running repairs and loading and unloading. What was not included was building the ship or making major structural repairs on the ship. Traditionally, those were functions of the shipwright and the shipyard worker. Those workmen have their own protections within their own industries, and no compelling reasons exist to extend to them protections which have their origin in the peculiarly hazardous and exacting occupation of the seaman and his peculiar relation to the ship itself.

CONCLUSION

Since the principle of law underlying the decision in this case is well established and uniformly recognized throughout the country, and since the only difficulty that may exist is difficulty in its application to any particular set of facts, a difficulty inherent in the application of all principles of law, there is nothing here which calls for the exercise of this court's power of supervision. The petition for the writ of certiorari should, therefore, be denied.

Respectfully submitted,

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